IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

MONDAY, THE 19TH NOVEMBER 2007 / 28TH KARTHIKA 1929

EFA.No. 41 of 2001()

AGAINST THE ORDER DATED 26/02/2001 IN EA.197/98 IN EP.8/96 IN OS.195/1984 of ADDL.SUB COURT, THALASSERY

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APPELLANTS: CLAIM PETITIONER
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1. **LALILAKATH ABDUL KHADER, S/O. ABDULLA, BUSINES MAN, RESIDING AT CHELERI AMSOM, AND DESOM, KANNUR TALUK, KANNUR DISTRICT.**

2. **PARAYIL EBRAHIM S/O. PALLIKUTTY, BUSINESSMAN , RESIDING AT CHELERI AMSOM AND DESOM, KANNUR TALUK, KANNUR DISTRICT.**

BY ADV. SRI.C.KHALID
SRI.N.GOPINATHA PANICKER

RESPONDENTS: RESPONDENTS/ PLAINTIFFS& DEFENDANTS
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1. **SYNDICATE BANK, CHIRAKKAL, BY ITS BRANCH MANAGER, P.O. CHIRAKKAL, KANNUR TALUK, KANNUR DISTRICT.**

2. **M/S. PREMIER MATCH INDUSTRIES , KOLACHERRY, REP.BY ITS PROPRIETOR , A.SETHU MADHAVAN, S/O. A. MAKKU, RESIDING AT SREE VALLY NILAYAM, P.O. CHIRAKKAL, KANNUR TALUK, KANNUR DISTRICT. (DELETED)**

3. **A.DAMODARAN, S/O. MAKKU, PARTNER, VINESSH MATCH INDUSTRIES, P.O. KOLACHERRY, KANNUR TALUK, KANNUR DISTRICT.(DELETED)**

RESPONDENTS 2 AND 3 ARE DELETED FROM THE PARTY ARRAY AT THE APPELLANTS RISK, AS PER ORDER DT. 8.11.02 IN CMP. 4412/02.

BY ADV. SRI.R.S.KALKURA

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON 19/11/2007, ALONG WITH EFA NO. 42 OF 2001 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

E.F.A.Nos.41 & 42 of 2001

Dated this the 19th November, 2007.

J U D G M E N T

E.F.A.Nos.41/2001 is filed against the order passed by the Executing Court in E.A.Nos.197/98 in E.P.8/1996 in O.S.No.194/1984. E.F.A.No.42/2001 is filed against an order passed in E.A.No.243/2000 in E.P.No.66/1998 in O.S.No.194/1984, on the file of the Subordinate Judges' Court, Thalassery.

2. The common first respondent in both these appeals filed O.S.No.194/1984 and O.S.No.195/1984 against respondents 3 and 4 for recovery of money. The suits were decreed. The decree holder filed E.P.No.8/1996 in O.S.No.195/1984 and E.P.No.66/1998 in O.S.No.194/1984 for realisation of the decree debts by sale of properties. When the properties were proclaimed for sale, the appellants filed E.A.No.197/1998 in E.P.No.8/1996 and E.A.No.243/2000 in E.P.No.66/1998 in O.S.Nos.194 & 195 of 1984. Both E.As were considered together. The Executing Court over ruled the claim put forward by the appellants and ordered sale of entire properties. The Executing Court grouped the entire properties into two.

The properties claimed by the appellants were taken as one group and the rest of the properties as another group. The Executing Court directed that the properties other than the one claimed by the appellants shall be sold in public auction first and that if the amount is not sufficient to cover the decree debt, the properties claimed by the appellants shall also be sold on the same day. According to the appellants, the area of 14 cents of land was attached by the Sub Collector under the provisions of the Revenue Recovery Act and sold the same on 19.9.1984 for recovery of the arrears of sales tax due to the Department. It was averred that one Othenan purchased that property. It was further averred that sale certificate was issued to Othenan under Section 56 of the Revenue Recovery Act and he in turn sold 14 cents of land to the appellants under Ext.A1 sale deed, dated, 22.10.1992. According to them, sale under the Revenue Recovery Act was free of all encumbrances and that property is not liable to be sold, and the remaining portion alone can be sold.

3. The first respondent, bank, contended that the judgment debtor mortgaged the entire property by deposit of title deeds on 5.11.1982. It was averred that the suits were filed in the month of October 1984 and the suits were decreed on 29.5.1986. It

was contended that the purchaser of the property under the revenue sale is not entitled to any preferential claim over the claim of the first respondent bank. The Executing Court found that the properties were sold subject to mortgage, and hence, the purchaser will get the property only with that encumbrance. It was also held that the sale is not free from encumbrance, unless there is an express provision to that effect. The Executing Court also considered the provisions of Section 73 of the Transfer of Property Act, and held that mortgagees are entitled to protection in respect of the sale proceeds to the extent of the arrears of revenue for which the property was sold by the public authority under the Revenue Recovery Act. It was further held that at the best, appellants can claim the value recovered by the Government as paid by them, which was outstanding as sales tax and costs of the revenue Recovery proceedings. Except that amount, they do not have a better claim.

4. The learned counsel appearing for the appellants has argued that the approach made by the Executing Court is illegal. It is argued that appellants are bonafide purchasers of 14 cents of land forming part of the property owned by the second respondent. It is argued that the revenue sale was on 14.9.1984 for a consideration of

Rs.17,150/=. One Othenan purchased the property. He subsequently sold the same to appellants. It is argued that the revenue sale was proceeded by an attachment of the properties, and on the date of execution of the mortgage, the judgment debtor was a defaulter as defined in the Sales Tax Act and hence a charge was created on the properties. It is argued that the properties were sold free of all encumbrances. It is argued that the suit was decreed on 29.5.1986.

5. It is an admitted fact that properties were sold for arrears of sales tax due to the Government. The sale was conducted on 14.9.1984 under the provisions of the Revenue Recovery Act, and it was purchased by one Othenan.

6. Section 17 of the Kerala General Sales Tax Act deals with the Procedure to be followed by the assessing authority. Section 23 of the Kerala General Sales Tax Act provides that, *'tax assessed or any other amount demanded under the Act shall be paid in such manner and in such instalments, if any, and within such time, as may be specified in the notice of demand, not being less than twenty one days from the date of service of the notice'*. It further provides that, *'if default is made in paying according to the notice of demand, the*

whole of the amount outstanding on the date of the default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax.' So, if a demand is made under Section 23 of the Kerala General Sales Tax Act, the amount demanded becomes a charge over the property.

7. In this case, judgment debtors executed equitable mortgage by deposit of title deeds on 5.11.1982. The suit was filed on 19.5.1984 and decree was passed on 29.5.1986. The court below had not considered as to whether there was a demand prior to the date of mortgage by deposit of the title deeds. The effect of revenue sale was also not considered properly. Further the court below has not considered the effect of Section 73 of the Transfer of Property Act properly. Both sides had not adduced evidence also on those points. Hence, I am of the view that it is only just and proper that the Executing Court re-considers the matter again and pass appropriate orders.

8. In the result, appeals are allowed. The orders dismissing E.A.No.197/1998 in E.P.No.8/1996 and E.A.No.243/2000 in E.P.No.66/1998 are hereby set aside. E.A.No.197/1998 and

E.A.No.243/2000 are remanded to the Executing Court for fresh disposal, in accordance with law, after affording both sides reasonable opportunity to adduce further evidence, if so adviced.

Parties are directed to appear before the Executing Court on 15.1.2008.

K.PADMANABHAN NAIR,
JUDGE

nj.

K.PADMANABHAN NAIR, J.

E.F.A.Nos.41 & 42 of 2001

J U D G M E N T

Dated: 19th November, 2007.